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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1464

GARLAND KNITTING MILLS OF BEAUFORT, SOUTH CAROLINA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals remanding the case to the Board (Pet. App. 10a–12a) is reported at 414 F.2d 1214; the court's judgment after remand (Pet. App. 2a) is not yet officially reported. The Board's initial decision and order (R. 594–660)[1] are reported at 170 NLRB No. 39; its supplemental decision and order (Pet. App. 6a–9a) are reported at 178 NLRB No. 62.

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[1] "R." refers to the joint appendix filed in the court below; a copy has also been filed with the petition (Pet. 2, n. 1).

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1969 (Pet. 2). A petition for rehearing was denied on February 9, 1970 (Pet. App. 1a). The petition for a writ of certiorari was filed on April 22, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the Board that a majority of the employees had signed valid cards authorizing the Union to represent them for purposes of collective bargaining.

2. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act by coercing the employees to reveal their union sympathy through the device of distributing garment tags to "pro-company" employees, and by promising benefits to the employees prior to a Board election.

3. Whether the Board properly ordered petitioner to bargain with the Union.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition (Pet. App. 13a–14a).

STATEMENT

In February 1966, the International Ladies' Garment Workers' Union, AFL–CIO, began an organizing campaign among the 321 production and maintenance employees at petitioner's Beaufort plant (R. 596–597; 57–58). It secured signed authorization cards from 177 of the 321 employees in the bargaining unit by March 7; it then informed petitioner that it had attained majority status, and demanded recognition as the employees' exclusive bargaining representative (R. 596–597; 57–58, 54–55). When petitioner replied that "We are not going to accept your cards" (R. 596; 55), the Union filed a representation petition with the Board; a Board election was scheduled for May 13 (R. 596, 623; 105, 376, 115–116).

In the period immediately preceding the election, the Company engaged in speeches, group meetings, and question and answer periods designed to counter the threat of unionization. During these talks Company President Bernat promised that the Union's defeat would be to the employees' material advantage, and that if the Union lost "he would treat [the employees] so good that [they] wouldn't want a union" (R. 34, 107, 133). President Bernat also led the employees to believe that qualified Negroes would be made supervisors (R. 631–632; 108, 133, 163, 164, 339),[2] that the wage structure would be reviewed and

[2] Although 40 percent of the employees were Negroes, there was only one Negro among the Company's supervisors prior to the election (R. 624; 339–340).

that "any changes that was going to be made was going to be made for the better" (R. 134, 147). During a speech the day before the election, Bernat affixed a Company garment tag to his lapel, to let the employees "know where I stand" (R. 623–624; 321).[3] After the speech, supervisors circulated through the plant offering employees similar tags and asking each if he wanted to wear one (R. 657–658; 82, 83, 106–107).

The Union lost the May 13 election by 174 to 103 (R. 596–597).[4] Immediately after the ballots were counted, Bernat announced to all employees in a "victory" speech that wage rates and piece rates would soon be raised; such promises were fulfilled in early June (R. 624; 333, 356–358). Increases in other benefits, including improvements in holiday and vacation pay, were also made at that time (R. 624; 135–136, 461–464).

By September 9 the Company had discharged two members of the Union organizing committee and had permanently laid off four more, all of whom were avowed union supporters. When Julia Frazier, one of the dischargees, asked why she was no longer employed, Company Personnel Manager Van Schyndel told her, "Well, you made a gamble; you tried to

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[3] The garment tags, which bear the Company's name in large letters, are put on garments the Company manufactures, and are kept on the employees' work tables (R. 623–624; 500).

[4] After considering the Union's objections to the election, the Regional Director ordered that it be set aside because of certain Company pre-election conduct, and directed a new election (R. 597). The charges in the instant case blocked further processing of the representation proceeding.

use the union as a bargaining agent, and you lost, and now we don't need you any more" (R. 636–637; 80–81).

The Board found that the Company violated Section 8(a)(1) of the Act by promising benefits to employees prior to the election, by granting them benefits after the election, and by distributing Company garment tags among employees and observing who accepted them (R. 657–658, 649). The Board also found that the Company violated Section 8(a)(3) and (1) by discharging or laying off six employees because of their union activities (R. 649, 658). The Board further found that the Union had obtained, without coercion, signed authorization cards from a majority of the employees in the unit when it requested recognition,[5] rejecting petitioner's contention that 12 cards were unreliable because of misrepresentations that a majority of the employees had already signed; the Board found that it was doubtful whether such statements were made, that it was "not clear * * * that the employees would not have signed the cards except for the alleged misrepresentations, or that there was any coercion inherent in the alleged misrepresentations," and that in any event "the statements of the solicitors, if made, * * * are not such misrepresentations as to invalidate the cards" (R. 618–620, 658). Finally, the Board found that petitioner violated

[5] The Trial Examiner found that the Union's majority on March 7 consisted of 167 authorizations from a unit totalling 321 employees. The Board, counted two other cards which were executed but not yet in the hands of the Union on March 7, thus finding a total of 169 valid cards (R. 658).

Section 8(a)(5) of the Act in that its refusal to bargain with the Union was not "in good faith but was motivated by [a] desire to gain time to dissipate the Union's majority," and that it had granted benefits to the employees without first negotiating with the Union (R. 658, 648–649). The Board ordered the Company to cease and desist from the unfair labor practices found and from in any like manner interfering with, restraining or coercing its employees in the exercise of their statutory rights; to reinstate the six employees with backpay; to bargain collectively with the Union; and to post appropriate notices (R. 659–660, 650–653).

The court of appeals sustained the Board's findings and conclusions with respect to the Section 8(a) (1) and (3) violations. The court also sustained the Board's finding that the Union possessed valid authorization cards from a majority of employees in the unit on March 7, 1966, but remanded the case to the Board for reconsideration of its bargaining order in light of *National Labor Relations Board* v. *Gissel Packing Co., Inc.,* 395 U.S. 575 (Pet. App. 10a–12a). On remand, the Board reaffirmed its initial order, finding that petitioner's "half-dozen discriminatory discharges or layoffs of employees, in addition to serious 8(a)(1) violations" were so flagrantly coercive that a bargaining order was required to repair their effect; and, moreover, that a fair rerun election was an unlikely possibility and thus the authorization cards more reliably reflected employee sentiment (Pet. App. 6a–9a). The court of appeals enforced the Board's order (Pet. App. 2a).

ARGUMENT

1. Petitioner's contention, that the Union's misrepresentation that a majority of the employees had signed authorization cards invalidated sufficient cards to deprive the Union of majority status, presents only an evidentiary issue that does not warrant further review. As the court below correctly held, the Board "properly found on substantial evidence" that the Union possessed a valid card majority (Pet. App. 12a). *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.*

The cases cited by petitioner (Pet. 8–12) do not require a contrary conclusion. In *G & A Truck Line, Inc.* v. *National Labor Relations Board,* 407 F. 2d 120, 122–123 (C.A. 6), the court, although finding that the union statements that two employees were the only ones who had not signed were false, held that this was not sufficient to vitiate their authorization cards, for, as here, the employees would have signed the cards regardless of the misrepresentations. In *National Labor Relations Board* v. *H. Rohtstein & Co.,* 266 F. 2d 407, 408–410 (C.A. 1), unlike here, the court found that the union's assertion of majority status to an employee was not only false, but also "of great importance to this particular employee," who would not otherwise have signed the card which gave

*The Board questioned whether the alleged misrepresentation (that a majority of the employees had already signed cards) had in fact been made, and found that, even if it had, there was no clear indication that the cards would not have been signed in any event. Thus, the alleged misrepresentation was not sufficient to invalidate the cards (R. 608–618).

the union a majority of one. In *Schwarzenbach-Huber Company* v. *National Labor Relations Board*, 408 F. 2d 236, 241–242 (C.A. 2), certiorari denied, 396 U.S. 960, the court found that the union had indulged in "flagrant misrepresentations" and deceitful omissions in addition to its false claim to a majority (*id.* at 242).

2. The second and third questions presented, which challenge the Board's finding that the Company's distribution of Garland tags and President Bernat's implied promises of benefit to employees violated Section 8(a)(1) of the Act, also present only evidentiary issues, inappropriate for further review. In any event, the record amply supports the Board's finding that petitioner's Garland tag conduct was coercive; by thrusting the choice of wearing a tag on each employee through his supervisor, the Company forced employees publicly to declare themselves as pro-Company or pro-Union—a serious risk in view of the absence of assurances against reprisal, and President Bernat's earlier promises of benefit to employees if they rejected the Union. Similarly, ample evidence supports the Board's findings that the implicit promises in President Bernat's speeches were not protected by Section 8(c) of the Act. The Board did not, as the Company suggests, base its finding on "speculation," but rather on a synthesis of the employees' testimony as to what they actually heard.[7] The Board

[7] The Trial Examiner's conclusion, adopted by the Board, reads as follows (R. 631):

"The employees testified that [Bernat] made direct promises that wage increases would be granted; piece rates would be in-

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properly found an implied promise of benefit on the basis of that testimony. See *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616–620.

3. Finally, petitioner contends that the Board has not fully applied the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co., supra,* in finding a bargaining order appropriate here. The Board's findings on remand (Pet. App. 6a–9a), however, show that it fully considered the factors which this Court set forth in *Gissel*. Cf. *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 229. Moreover, in view of the conduct which this Court deemed sufficient to warrant a bargaining order in *Sinclair Company* v. *National Labor Relations Board*, 395 U.S. 575,[8] the Board did not abuse its discretion in imposing a bargaining order for the more extensive unfair labor practices here.

Petitioner's contention that the amount of time which has elapsed since the election should have been considered in determining whether a new election would be preferable to a bargaining order runs directly counter to *Gissel*. The Court there reemphasized

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creased; new methods of overtime pay would be introduced; Negro supervisors and service girls would be appointed and that these improvements would take place immediately after the election if the Union were rejected. It is clear that no one clearly recalls what was said by Bernat but it is equally clear and I find that from what Bernat said the employees honestly reached the conclusion that the promises set forth above had been made."

[8] In *Sinclair* (one of the cases decided in *Gissel*), the Court found that a bargaining order was appropriate where the only unfair labor practices were veiled threats of plant closure by the company president. 395 U.S. at 615.

that the lapse of time—here due entirely to the ordinary delays of litigation—does not justify a court of appeals' refusal to enforce a bargaining order remedy in a case such as this. 395 U.S. at 610–611. See also *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1970.

* To the extent that *National Labor Relations Board* v. *American Cable Systems, Inc.* (C.A. 5), March 30, 1970, 73 LRRM 2913, and *Clark's Gamble Corp.* v. *National Labor Relations Board* (C.A. 6), March 4, 1970, 73 LRRM 2669, rehearing denied April 10, 1970, suggest a different view, we submit that those decisions are contrary to *Gissel* and *Katz*, *supra*.

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